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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-900

FLOYD E. McDOWELL,
Petitioner,

versus

TEXAS BOARD OF MENTAL HEALTH
AND MENTAL RETARDATION, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Floyd E. McDowell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 6th, 1971, rehearing denied, en banc, August 29th, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit affirming the judgment of the District Court for the Western District of Texas, and the order denying rehearing are reported at 465 F.2d 1342. The District

Court's judgment of June 26th, 1970 is not reported, it is reproduced in the Appendix, as are the opinions of the Court of Appeals for the Fifth Circuit.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered May 6th, 1971. On August the 29th, 1972, after reconsideration en banc, the Court reaffirmed the decision of the original panel with five judges specially concurring. On November 29th, 1972, upon application of counsel for Petitioner, Associate Justice Lewis F. Powell, Jr. ordered that the time for filing a petition for writ of certiorari be extended to December 20, 1972. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

(1) Does the 14th Amendment prevent a state from summarily discharging a superintendent of a state school because of his refusal to accept political favoritism as the standard for determining school admission, when such political favoritism not only violates the state's published standards for determining eligibility for admission but results also in the admission of an ineligible applicant and the denial of admission to eligible applicants on the waiting list for admission?

(2) In view of evidence (a) that Dr. McDowell suffered injury to his reputation by virtue of the Defendants' publicizing of his discharge and/or (b) that his employment understanding contemplated a continuing

employment relationship, was McDowell thereby entitled to any form of procedural due process in connection with his discharge as a state employee?

STATEMENT OF THE CASE

The Hiring of Dr. McDowell

Dr. McDowell was employed as Superintendent of the Richmond State School, effective August 29, 1966 (App. 127).* At the time he was acting chief of the Mental Retardation Program for the National Institute of Mental Health (App. 32). The School was still under construction, and McDowell's first year of employment was to be spent in an "internship" in preparation for the opening of the School (App. 127). The School officially opened on April 15, 1968 with McDowell as Superintendent (App. 137).

The Discharge of Dr. McDowell

On June 19, 1968, Dr. McDowell was summoned to the state offices in Austin and summarily discharged (App. 136). Simultaneously, the Defendant state officials issued a press release (App. 137) stating in part:

> "Floyd E. McDowell, Ed. D., was today relieved of his duties as Superintendent of the Richmond State School, ... The Richmond School officially opened on April 15, 1968. 'We deeply regret having to take this action but feel it is

*References are to the printed Appendix in the Court of Appeals.

in the best interest of the children of the Richmond State School and the retarded of the Gulf Coast Area,' Dr. Kinross-Wright said."

When told of his discharge, Dr. McDowell asked for the reason and was advised that "they didn't have to give any reasons" (App. 50). Later in the interview McDowell was told that he had "cursed the Deputy Commissioner or Commissioner in a meeting" (App. 50). McDowell denied this accusation and asked who had brought these charges, stating "I would like a hearing;" he was advised that he wouldn't get a hearing (App. 50-1).

Thereafter McDowell renewed his request for hearing in part to have an opportunity to answer the "untrue statements that were in the news media" (App. 55). Even though he offered to underwrite the expense of a hearing (App. 55), his efforts to obtain specification of reasons for discharge and a hearing were fruitless.

The discharge of McDowell, who enjoyed a substantial national reputation in the field of mental health and mental retardation, received wide publicity in the news media, both within and without the state (App. 57-9).

The Reason for McDowell's Discharge

The Court of Appeals assumed, and the record demonstrates, that McDowell's discharge "eventuated from an invalid order" 465 F.2d at 1345. The order, which McDowell resisted, was to admit to the Richmond

School for purely political reasons the son of State Senator Wayne Connally.

On May 15, 1968, Defendant Barnett, who was McDowell's superior, visited the Richmond School which was in the process of opening (App. 42). Dr. Barnett voiced no criticism of the program (App. 42), but during his visit he questioned the Director of Admissions about the admission application of Wyatt Connally. Barnett was tendered the staff evaluation and advised that the staff did not "feel that the child should be admitted" (App. 43). Barnett refused the proffered report and informed McDowell: "I am not interested in seeing the folder . . . Admit this child or pack your bags."[1] (App. 43, 88). When Dr. McDowell expressed his reluctance, Barnett told McDowell that he was going to "ream him a new _____" (App. 107). Dr. Barnett returned to Austin and promptly delivered to the Commissioner of the Department of Mental Health and Mental Retardation, his written recommendation that Dr. McDowell be fired (App. 107-08).[2]

Under the regulations and procedures of the Department of Mental Health and Mental Retardation, responsibility for evaluation of applicants for admission was assigned to staffs of the schools operated by the

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[1]Barnett had previously advised Dr. McDowell that "all admissions of a political nature are to be approved in advance through this office . . ." (App. 129).

[2]Despite the foregoing undisputed evidence with respect to Barnett's conduct, Defendants nevertheless in their pleading "specially deny that on May 15, 1968 Plaintiff was instructed to admit the son of Senator Wayne Connally to Richmond State School . . ." (App. 6).

Department (App. 113). The evaluation of the Connally application (App. 134), which Barnett declined to inspect, had been prepared by the professional staff of the Richmond State School in keeping with the established program of the School (App. 92-6)[3] and the applicable Texas statute governing order of admissions (App. 87).[4] At the time of Barnett's visit to the Richmond School on May 15th there was a lengthy waiting list for admission (App. 45, 93), and it was apparent that there would be hundreds of eligible applicants who would be unable because of lack of space to gain admission to the School. Dr. McDowell had been instructed that the admissions to the Richmond State School should be comprised of two categories, new admissions from the fifteen county area surrounding the Richmond State School and persons who were already students at one of the other state schools whose parents or others had requested transfers to Richmond, Wyatt Connally fell in neither category (App. 106).

McDowell resisted the instructions to admit the Connally child because he felt the order violated the regulations that governed him, and also because he could not from a "moral or ethical point of view" accept the

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[3]The program was established to serve the severely retarded (App. 92). Wyatt Connally was classified as only moderately retarded (App. 96).

[4]The Texas statute provides: "In determining the order in which eligible persons are admitted to its available facilities the Board shall consider the following factors: (1) the relative need of the person for special training, education, supervision, treatment, care or control; (2) the impact of the person upon the community; and (3) the ability of the person's family to assimilate him effectively into family life . . ." Tex. Rev. Civ. Stat. Art. 3871b, Section 10.

practice of political favoritism (App. 47). When Barnett later prepared a report to the State Board of Mental Health concerning McDowell's discharge, he misinformed the Board that McDowell's discharge was not in the "context" of the Connally admission.

The Injury to Dr. McDowell

In order to secure employment in his chosen field, Dr. McDowell was forced to move his family to New York where he was employed at the time of trial (App. 63) and although his salary was comparable in the New York employment, he suffered substantial financial injury as a result of the discharge (App. 64).

More important than the financial injury, there was undisputed testimony from a leading figure in the field of mental health that the circumstances of his discharge, including the notoriety given the case, injured McDowell's reputation as an administrator in the field of mental health and mental retardation (App. 102).

The Disposition Below

The case was tried to a jury. At the conclusion of Plaintiff's case the District Court granted Defendants' Motion for Judgment, concluding that there was no federal question presented.

The Court of Appeals affirmed and, after rehearing en banc, with five judges specially concurring, the opinion of the original panel was reconfirmed. (See Appendix.)

REASONS FOR GRANTING THE WRIT

The Opinion of the Court of Appeals Is Inconsistent with Recent Decisions of this Court

The Court of Appeals wrongly characterized McDowell's case as having "raised and proved purely state issues" 465 F.2d at 1347. Similar reasoning would have resulted in a dismissal of the Plaintiff's suit in *Goldberg v. Kelly*, 397 U.S. 254 (1970) on the theory that the Plaintiff there sought benefits conferred by state statute. McDowell alleged, proved and argued federal constitutional claims of a substantial nature from the outset, and McDowell is entitled to a determination of those claims.

"Relevant constitutional restraints apply" to the withdrawal of public assistance benefits, *Goldberg v. Kelly, Ibid;* denial of tax exemption, *Speiser v. Randall*, 357 U.S. 513 (1958), and discharge from public employment, *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956). The State of Texas having established schools for the mentally retarded, it would seem clear that "relevant constitutional restraints" apply to the right to attend such a state supported school. Indeed if the extent of the right depends in any measure upon the extent of the need, it is hard to imagine a more compelling case than that of the family of a mentally retarded child seeking specialized training and care provided by state schools for the mentally retarded.[8] We

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[8]The record reflects that there was a waiting list of some twenty-one hundred for the five hundred beds at the Richmond State School.

proceed on the assumption that these relevant constitutional restraints are applicable to the selection of applicants for admission to the Richmond State School.

If public employment cannot be conditioned upon one's political activity, *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898 (1961), assuredly a right to receive the benefits of a state's mentally retarded institution could not be so conditioned. The Texas statutes creating the Texas Department of Mental Health and Mental Retardation, and establishing the standards for admission to those schools, created a protectible interest in the parents of mentally retarded children. cf. *Board of Regents v. Roth*, ____ U.S. ____, 92 S.Ct. 2701, 2709 (1972). The parents of the mentally retarded children on the waiting list at the Richmond State School had an interest in their child's attendance at such school, an interest that could not be arbitrarily denied. To utilize political favoritism, and to ignore the established standards for admission to such schools, is a grave injury to the parents of eligible children who are denied admission because of the lack of available space. Unfortunately the parents on the waiting list of the Richmond State School will not learn of the administrative decision that deprives them of their right to fair allocation of space in the school, for such internal decisions are not made in the public view. Unless someone, such as McDowell, is prepared to resist the pressures of political favoritism, then the ostensible right to fair allocation of hospital space is a hollow one that will not survive the "vagaries and vicissitudes of Texas politics," 465 F.2d at 1345. The Court of Appeals suggests

that McDowell in refusing the "invalid order" was simply hearing "a different drummer," 465 F.2d at 1348. We suggest that the different drummer to which McDowell was listening was the beat of the 14th Amendment mandating fair treatment and prohibiting arbitrary action.

If we are right that "relevant constitutional restraints" do apply to the allocation of the limited space in the Richmond State School, then assuredly McDowell has established a federal constitutional claim, for McDowell's "right" to refuse the unlawful command is a necessary correlative of the rights of those seeking admission to the School. As in *Barrows v. Jackson,* 346 U.S. 249 (1953), "It would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." In order to "protect the fundamental rights" of the applicants for admission to the Richmond State School, it is necessary that McDowell be permitted to assert the rights which he has sought to defend, 346 U.S. at 257. Similarly, McDowell's relationship to the constitutional right involved was not merely "fortuitous" but rather "the relationship between one who acted to protect the rights of a minority and the minority itself," *Eisenstadt v. Baird,* ____ U.S. ____, 92 S.Ct. 1029, 1034 (1972). Neither the applicant for admission to the Richmond State School nor his family is a party to the administrative selection and screening process, and thus "to require" that only the applicant may assert the right to have his application judged fairly "would result in nullification of the right at the very moment of its as-

sertion," *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 459 (1958). Unless McDowell is protected in asserting the rights of applicants for admission to fair treatment there is every reason to fear that these rights will be "diluted or adversely affected," *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965). For, if McDowell can be discharged for seeking to secure to applicants their constitutional right to due process, then the right to have one's application for admission fairly judged is a nullity.

Whether it be viewed as a right to fair treatment in the admission process, or a right of McDowell's to be free from arbitrary discharge, *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952), McDowell has presented a federal claim which he is entitled to have resolved by the trier of fact.

A further reason for granting writ is the utter lack of procedural due process in the circumstances of McDowell's discharge. Denied an opportunity to be heard, he was summarily discharged from a presumably long term position and publicly pilloried. There was undisputed evidence that his public discharge injured his professional reputation, an issue which the jury was never afforded an opportunity to appraise. Such an injury by the State must be accompanied by the rudiments of due process, *Perry v. Sindermann*, ____ U.S. ____, 92 S.Ct. 2694 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Crawford C. Martin, Atty. Gen. of Texas, Jack Sparks, Asst. Atty. Gen., Austin, Tex., Jack B. Manning, Houston, Tex., Nola White, First Asst. Atty. Gen., Alfred Walker, Executive Asst. Atty. Gen., J. C. Davis, Asst. Atty. Gen., Austin, Tex., for defendants-appellees; Bean & Manning, Houston, Tex., of counsel.

Before SKELTON*, Judge, and MORGAN and CLARK, Circuit Judges.

CLARK, Circuit Judge:

Dr. Floyd E. McDowell filed this action, based upon 42 U.S.C.A. § 1983 (1970).[1] Jurisdiction was allegedly

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*Honorable Byron G. Skelton, U. S. Court of Claims, sitting by designation.

[1]Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

based upon 28 U.S.C.A. § 1343(3) (1962).[2] The defendants were the State of Texas, the Texas Board of Mental Health and Mental Retardation (Board), and certain Board officials. Plaintiff alleged that he was denied substantive and procedural due process by virtue of his discharge from the position of Superintendent of the Richmond State School, an institution operated by the Board. In addition to the asserted federal claim, McDowell sued two Board officials and a private party, David Sloane, under a pendent State claim of slander. At the conclusion of McDowell's evidence, the district court granted motions by all defendants for directed verdicts against McDowell on both the federal and State counts. McDowell appeals, contending he established his claims as a matter of law or, in the alternative, presented sufficient evidence to create jury issues.

Dr. McDowell, who enjoys a substantial national reputation in the field of mental health and mental retardation, was employed by the Board as Superintendent in 1966. Approximately 22 months later he was discharged summarily for reasons never made altogether certain. The Board said his discharge eventuated from generally unsatisfactory services. In the trial court it particularized 11 specific grounds for his discharge in its an-

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[2]The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or all persons within the jurisdiction of the United States;

swer. In general, the Board now contends that Dr. McDowell's discharge resulted from inefficiency, incompetency and insubordination. The Board further contends that because Dr. McDowell had no tenure or contractual term of employment, they were at liberty to terminate his services with or without cause at will under applicable Texas law.[3] Despite the present specifications and despite admitted advice given to Dr. McDowell at the time of his discharge that he was being dismissed for cursing his superiors, Dr. McDowell asserts that the real reason for his discharge was his refusal to follow orders of his superior, Dr. Charles Barnett, the Deputy Commissioner, to admit the mongoloid son of a State senator. Dr. McDowell contends that the admission of this child would have been contrary to Texas law[4] and the established program of the Richmond State School. Dr. McDowell requested a hearing before the Board at which he could contest his discharge, and even offered to bear the cost of such a procedure, but this request was denied.

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[3]Tex.Rev.Civ.Stat.Ann. Art. 691 (1964).

[4]Tex.Rev.Civ.Ann.Art. 3871b § 10 (1966), provides in pertinent part:

> "In determining the order in which eligible persons are admitted to its available facilities the Board shall consider the following factors: (1) the relative need of the person for special training, education, supervision, treatment, care or control; (2) the impact of the person upon the community; and (3) the ability of the person's family to assimilate him effectively into family life. * * *"

Dr. McDowell also refers us to Tex. Rev.Civ.Stat. Art. 6252-9 § 3(c) (1970), which proscribes special favors to legislators.

SLANDER

There is no dispute in the evidence that Sloane reported to Board officials that Dr. McDowell had imputed a canine status to the mothers of both the Commissioner and Deputy Commissioner of the Board at a public meeting. Dr. McDowell offered proof that Sloane's report that he had spoken these words was false. Both the Commissioner and the Deputy Commissioner were charged with giving this statement currency at a meeting of the Board without investigation or authentication. The slander charges against these Board officers have been dropped and only the charge against Sloane is pressed on this appeal.

[1, 2] Dr. McDowell admitted during oral argument before this court that the decision to fire him had already been made when Sloane tendered his report to the Commissioner and the deputy. Sloane argues from this admission that since Dr. McDowell could have suffered no damages by reason of Sloane's utterances, the words are not actionable. This argument would have validity if Sloane's statements were not slanderous per se. However, when statements are shown to be slanderous per se, it is unnecessary for a plaintiff to plead and prove special damages. Bell Publishing Co. v. Garrett Engineering Co., 141 Tex. 51, 170 S.W.2d 197 (1943); Buck v. Savage, 323 S.W.2d 363 (Tex.Civ.App.—Houston, 1959, writ ref'd n. r. e.); Texas Plastics, Inc. v. Roto-Lith, Limited, 250 F.2d 844 (5th Cir. 1958). Utterances are slanderous per se if they are false, made without privilege and ascribe to another conduct, characteristics or a condition incompatible with the proper con-

duct of his lawful profession or office. Restatement of Torts, § 573 (1938); Bell Publishing Co. v. Garrett Engineering Co., *supra;* Mayo v. Goldman, 57 Tex.Civ. App. 475, 122 S.W. 449 (1909); Texas Plastics v. Roto-Lith, *supra.* It would appear that Sloane's description of Dr. McDowell's verbal conduct would fall into this category since the description tended to lower Dr. McDowell's professional reputation and to affect the financial gains he received from his profession. *See* Restatement of Torts, *supra,* Comment b at page 178.

[3, 4] But even assuming arguendo that Sloane's statements were slanderous per se, we have determined from the record that they were qualifiedly privileged. A qualified privilege attaches to statements which occur under circumstances wherein any one of several persons having a common interest in a particular subject matter may reasonably believe that facts exist which another, sharing that common interest, is entitled to know. Restatement of Torts, *supra,* at § 596; Perry Bros. Variety Stores, Inc. v. Layton, 119 Tex. 130, 25 S.W.2d 310 (Tex. Comm'n App. 1930, opinion adopted); Gulf Construction Co. v. George E. Mott Const Co., 442 S.W.2d 778 (Tex. Civ.App.—Houston [14th Dist.] 1969, no writ); Buck v. Savage, *supra.* Sloane was Executive Director of the Texas Association for Retarded Children, Inc., an eleemosynary group whose purpose is to foster the treatment, care and rehabilitation of retarded children. His statements were made to executive personnel of the Board, whose official duties were to act in furtherance of the purpose of Sloane's charitable group. Thus, both parties to the communication had a common interest in mentally retarded children and a

common interest in the harmony and competency of the staff employed by the Board to work with such children. Obviously these parties shared a vital common interest in any act of openly voiced antipathy within the staff.

Dr. McDowell could have shown that the protection accorded by this qualified privilege was unavailable had he been able to prove malice toward him on the part of Sloane, Gulf Construction Co. v. George E. Mott Const. Co., *supra;* Buck v. Savage, *supra;* however the record is barren of any such evidence. Thus the district judge was correct in directing a verdict in favor of the defendant Sloane on the slander count.

SUBSTANTIVE DUE PROCESS

Dr. McDowell argues that the child Dr. Barnett ordered him to admit to the Richmond School was not eligible for admittance under State law[5] or school policy. The defendants dispute this contention, but for purposes of our review of the directed verdict on the substantive due process ground, we accept as correct Dr. McDowell's claims that the admittance would have been improper and that the pressures brought to bear on him to admit this child were due solely to the vagaries and vicissitudes of Texas politics, and thus credit Dr. McDowell's claim that his discharge eventuated from an invalid order.

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[5] *See n. 4, supra.* As can be seen, the statute is framed in the most subjective of terms.

This raises the question neatly. Under the facts we assume to be true, was a federal statutory or Constitutional right involved when a State Board fired a State employee contrary to State law for local political considerations? Insofar as substantive due process is concerned, our answer is no.

Before detailing the reasoning which leads us to this conclusion, it is appropriate to expressly note what is *not* involved in the case at bar. There is no claim that Dr. McDowell has been denied First Amendment rights, nor that he has suffered any deprivation on account of race or color, nor that any explicit federal Constitutional or statutory prohibition has been transgressed. Dr. McDowell makes no assertion that just State forums are not readily available to him and capable of affording complete relief. Moreover, the uncontradicted evidence demonstrates that, rather than the actions of the defendant depriving him of the means of livelihood, within 11 days after his discharge by the Board, Dr. McDowell had received 20 job offers and accepted one of these jobs offers at a higher salary than he was receiving when he was fired.

[5, 6] The termination of Dr. McDowell's status as a State employee rests solely on a claim that his employers violated State statutes and local policies in affecting his termination. The right to employment by a State, in itself, is not a right secured by the Constitution or by the Laws of the United States; thus, even an invalid or an improper discharge from such an office, unaccompanied by some more precise claim of *federal*

right than a general claim of lack of due process,* is not the sort of deprivation of a right, privilege or immunity which is secured by the Constitution of the United States or an Act of Congress providing for equal rights of citizens within the meaning of 28 U.S.C.A. § 1343(3). *Cf.* Johnson v. Hood, 430 F.2d 610 (5th Cir. 1970). Cases of this genre constitute uniquely State causes of action. As such they are peculiarly within the realm of State courts. "A right to have state (or city) laws obeyed is a state, not a federal right." Love v. Navarro, 262 F.Supp. 520 (D.C.Cal. 1967). "Mere violation of a State statute does not infringe the federal Constitution." Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944); *Cf.* Gentry v. Howard, 288 F.Supp. 495 (E.D.Tenn. 1968). Even though it is patent that the amorphous and protean contours of substantive due process under the Fourteenth Amendment extend to all citizens in all sorts of conditions and circumstances, it is equally axiomatic that federal jurisdiction under § 1343(3) and 42 U.S.C.A. § 1983 cannot be extended to that purely local squabble by the mere invocation of the generalized protection which these words of the amendment confer.

The Constitution's deeply embedded concepts of federalism demand that we refuse a procedure of statutory construction that would put such a literal gloss on the words of §§ 1343 and 1983 as would kill the spirit the founding fathers quickened when the people of the sovereign states ceded sufficient governmental power to form a sovereign union. National Woodwork Manufac-

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*A right also guaranteed by the Texas Constitution, Art. I § 19.

turers Ass'n v. N. L. R. B., 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967). If we were to distort §§ 1343 and 1983 to vest federal courts with jurisdiction over the uniquely local substantive matters which this case presents, we would not only impair our ability to consider the vast array of cases that properly belong in federal forums but, as surely as sunrise, we create yet another and an unnecessary interference with orderly State processes.

Only if a false vanity duped us into supposing that the quality of justice in the federal court system is somehow superior to that dispensed by the State, could we justify such an incursion into intrastate affairs. To the contrary, State courts are best equipped to determine the meaning and the scope of State statutes and local policies and to determine whether State officials encroached upon Dr. McDowell's rights of due process which are fully preserved in Texas courts by the Texas and the federal Constitution. *Cf.* Hill v. City of El Paso, Texas, 437 F.2d 352 (5th Cir. 1971). This is the basic premise for federal deference to State decisional processes in Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970) and Fornaris v. Ridge Tool Co., 400 U.S. 41, 91 S.Ct. 156, 27 L.Ed.2d 174 (1970).

More recently the Court expressed these fundamental concepts on which we here depend in these words:

> "• • • 'comity' • • • [between the State and federal court system involves] a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union

> of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

[7] This is not to say that the directed verdict is supportable on any theory of abstention or exhaustion. It would not be. Moreno v. Henckel, 431 F.2d 1299 (5th Cir. 1970), makes it clear that §§ 1983 and 1343 make the federal remedy they afford *supplementary* to any State judicial or administrative processes. What we hold penetrates the tissue of the issue raised to the structure of the right itself. In *Moreno* we pointed out: "The questions in this case are *all* federal questions." We know now that the reverse was so in Dr. McDowell's case. He raised and proved purely State issues that never did belong in the district court. When sufficient fact development occurred to make that clear, that court did not err in directing verdicts for the defendants on the substantive due process claim.

PROCEDURAL DUE PROCESS

Dr. McDowell urges that he was denied procedural due process by the State's failure to accord him a hearing on his discharge and that this failure constitutes a separate ground for federal jurisdiction. Specifically, Dr. McDowell seeks to place himself within the scope of Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970), wherein we held that a college professor with

expectancy of reemployment must be accorded a hearing at which reasons for his discharge were established by the State. The record is devoid, however, of any evidence that Dr. McDowell had such an expectancy of reemployment. There was no definite commitment by the State to any particular term for his services. Further, the defendants made no representations to Dr. McDowell that would reasonably lead him to believe that he could expect to remain employed for any particular period of time. Finally, we note that Texas law expressly vests the Board "with full authority and discretion to terminate the employment of any such superintendent at any time."[7] Thus, the lack of any expectancy of continued employment on the part of Dr. McDowell distinguishes *Ferguson*.

However, in Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970) we held that a State employed teacher *without* expectancy of reemployment, had to be accorded minimal procedural due process if he challenged his discharge. If such a State employee, who contractually can be discharged at any time and without cause assigned, wishes to assert that his discharge is only nominally an exercise of contractual prerogatives and in reality constitutes an invasion of a specific constitutional right (in that case the right to petition the legislature for redress of grievances), that employee may give reasonable notice of his claim to the State agency by which he was discharged. When such a notice is served, the employee is, under the federal Constitution, entitled to a hearing at which he must be afforded a

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[7]Tex.Rev.Civ.Stat.Ann. Art. 691 (1964).

reasonable opportunity to prove his assertions. *See* 430 F.2d at 944. In dictum, this same principle was applied to the discharge of a city policeman who asserted the true basis of his dismissal was a denial of freedom of association. Battle v. Mulholland, 439 F.2d 321 (5th Cir. 1971). *See also* Fluker v. Alabama State Board of Education, 441 F.2d 201 (5th Cir. 1971). This federal right to a hearing which comports with minimal due process does not belong to school teachers alone, nor does it extend only to those who found their claim upon a federal substantive right. It has been accorded to students attending a State college, Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961); to county high school students, Williams v. Dade County School Bd., 441 F.2d 299 (5th Cir. 1970); to a doctor seeking admission to the staff of a county hospital, Sosa v. Board of Managers of Val Verde Memorial Hosp., 437 F.2d 173 (5th Cir. 1971); to persons whose names are posted in retail liquor outlets as given to excessive drinking, Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L. Ed.2d 515 (1971); and to welfare recipients whose benefits are terminated. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Thus, our determination that Dr. McDowell was not denied federal substantive due process does not control our determination with regard to whether he possessed a federal procedural right. Since he charged that the Board really cloaked a wrong under Texas law in the garb of a contractual dismissal, the question turns upon whether Dr. McDowell has a right to have those federal Constitutional procedures defined in the other situations mentioned above applied in judging

the validity of his termination. In other terms, did he have a right to a hearing before some impartial official with a meaningful opportunity to try to establish his contentions and confront his detractors? We hold not.

Under the circumstances of this case, no federal Constitutional right to a trial type hearing existed. In Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961), the Supreme Court held federal Constitutional due process did not require such a hearing in every conceivable case of governmental impairment of private interests. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. [Citing cases] Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. It is compounded of history, reason, the past course of decisions * * * [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved, as well as of the private interest that has been affected by governmental action. Where it has been possible to characterize that private interest as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required." 367 U.S. at 895, 81 S.Ct. at 1748.

Here, as in *McElroy*, the State government was involved with the dispatch of its own internal affairs. It was a case in which governmental employment could

be revoked at the will of the appointing officer. There was no issue of discrimination on the grounds of race or religion; no badge of disloyalty or infamy which foreclosed other employment opportunities, was here present. Accepting all he says as so, Dr. McDowell and his superiors simply heard "a different drummer" — the Deputy Commissioner, responding to Texas politics, demanded the admission of a particular child, while Dr. McDowell, responding to Texas law, refused the demand.

While a State government does not have the same freedom of action enjoyed by a private employer, no one could seriously doubt that a State may choose to employ personnel without imbuing them with job tenure or civil service type rights of job continuity. This court, under the guise of enforcing procedural due process, could not require a State to assume the financial burden inherent in giving every employee who voluntarily assumed a position of employment terminable at the will of the employing authorities, the right to provoke a hearing when he wishes to challenge his discharge. We have no prerogative to dictate the contractual terms of State employment. A fortiori, we cannot vary those conditions the parties deliberately assumed for themselves.

[8] Again, as in the portion of this opinion dealing with substantive due process, it is important to note that we are dealing only with an averment and proof which claimed that State officials acted contrary to State statutes in terminating a temporary employment arrangement. Unlike Dr. Ferguson, Dr. McDowell had

no expectancy of reemployment. Unlike Sindermann or Battle, he asserted no deprivation of specific Constitutional rights. Unlike Dixon, Williams, Dr. Sosa or Kelly, he was not excluded from a group having a right or privilege extended or conferred to others similarly situated — the State had and would have the prerogative of discharging or replacing Dr. McDowell whenever it suited their pleasure. Unlike Constantineau, he was not branded as disloyal or infamous — he readily obtained numerous offers of other employment in his field.

In balancing his private interests and the precise nature of the governmental function involved in the overall realities of this situation, we conclude his position was analogous to the worker fired by McElroy and that Dr. McDowell had no federal Constitutional right to a trial-type hearing.

The decision of the district court is
Affirmed.

Aug. 29, 1972

Before JOHN R. BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

PER CURIAM:

Subsequent to en banc briefing, argument and reconsideration of this cause, the Supreme Court decided Board of Regents of State Colleges v. Roth, ____ U.S. ____, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and Perry v. Sindermann, ____ U.S. ____, 92 S.Ct. 2694, 33 L.Ed.2d

570 (1972), which review and distill the rules of procedural due process in State employment termination situations. These decisions make it clear that the opinion of the panel was correct and it is adopted as the opinion of the court en banc.

JOHN R. BROWN, Chief Judge, with whom WISDOM, GOLDBERG and SIMPSON, Circuit Judges, join specially concurring:

While I concur in the decision reached here on the basis of the Supreme Court's opinion in Perry v. Sindermann, 1972, ____ U.S. ____, 92 S.Ct. 2694, 33 L.Ed.2d 570, I wish to underscore heavily and indelibly what was said in the companion case of Board of Regents v. Roth, 1972, ____ U.S. ____, 92 S.Ct. 2701, 33 L.Ed.2d 548 regarding the circumstances under which the termination of public employment without notice or hearing would constitute a "deprivation of liberty" proscribed by the due process clause of the Fourteenth Amendment:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Wisconsin v. Constantin-

eau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515; Wieman v. Updegraff, 344 U.S. 183, 191, 73 S.Ct. 215, 219, 97 L.Ed. 216; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817; United States v. Lovett, 328 U.S. 303, 316-317, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252; Peters v. Hobby, 349 U.S. 331, 352, 75 S.Ct. 790, 801, 99 L.Ed. 1129 (concurring opinion). See Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 898, 81 S.Ct. 1743, 1750, 6 L.Ed.2d 1230. In such a case, due process would accord an opportunity to refute the charge before University officials.[12] In the present case, however, there is no suggestion whatever that the respondent's interest in his "good name, reputation, honor or integrity" is at stake.

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12. The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons.

Considered in the abstract the press release issued by the Texas Board of Mental Health and Mental Retardation, stating that Dr. McDowell's discharge was "in the best interest of the children of the Richmond State School and the retarded of the Gulf Coast area," may have come close to the sort of officially sanctioned innuendo which the Supreme Court had in mind. However, in view of the fact that Dr. McDowell received approximately twenty offers of employment within eleven days after being fired, one of which he accepted

at a higher salary than he had previously earned, I cannot conclude on the basis of the facts revealed by this record that he has demonstrated the denial of a right protected by the due process clause. Insofar as the Court holds that the mere *fact* of termination is insufficient to establish the requisite "deprivation of liberty," I agree. But it is now crystal-clear that when the proof shows that the denial or termination of public employment has been accomplished in a manner adversely affecting an individual's "good name, reputation, honor or integrity," some reasonable opportunity for a response must be provided. Whatever prerogatives a State may enjoy as an employer, unrestrained character assassination is not one of them.

JUDGMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

FLOYD E. McDOWELL

versus Civil Action
No. A-69-CA-77

THE STATE OF TEXAS, TEXAS BOARD FOR MENTAL HEALTH AND MENTAL RETARDATION, DR. JOHN KINROSS WRIGHT, DR. CHARLES BARNETT AND DAVID SLOAN

On the 22nd day of June, 1970, a day in a regular term of this Court, came on to be heard the above styled and

numbered cause pending in this Court, wherein Floyd E. McDowell is Plaintiff and the State of Texas, Texas Board for Mental Health and Mental Retardation, Dr. John Kinross-Wright, Dr. Charles Barnett and David Sloan are Defendants. Came all parties in person and by their respective attorneys of record and announced ready for trial. A jury having been demanded, came a jury of good and lawful men and women, to wit: Herman Hodde and eleven others, who, being duly impaneled and sworn, constituted the jury in this cause. The Plaintiff then presented his evidence to the Court and to the jury on June 22nd, 1970, and June 23rd, 1970, and rested his case. Thereupon, the Defendants made their respective motions for judgment and after considering the pleadings, the Plaintiff's evidence, and the arguments of counsel the Court granted the motions of the Defendants for judgment, withdrew the case from the jury, and the jury was dismissed. The Court finds the law and the facts to be in favor of the Defendants and against the Plaintiff. As to Count 1 of Plaintiff's Compiaint, the Court finds that no federal question is involved and that under the evidence presented by the Plaintiff his employment as superintendent of Richmond State School was legally terminated by the Texas Board for Mental Health and Mental Retardation, Dr. Kinross-Wright and Dr. Barnett. As to Count 2 of Plaintiff's Complaint, the Court finds the evidence to be legally insufficient to establish any liability by Defendants to Plaintiff.

It is accordingly ORDERED, ADJUDGED and DECREED by the Court on this 23rd day of June, 1970, that Plaintiff Floyd E. McDowell take nothing by his

suit against Defendants The State of Texas, Texas Board for Mental Health and Mental Retardation, Dr. John Kinross-Wright, Dr. Charles Barnett and David Sloan, and that all court costs which have accrued herein shall be and the same are hereby taxed against the said Plaintiff, for which let execution issue.

Done and order entered this _____ day of June, 1970.

JUDGE JACK ROBERTS

FILED
JAN 6 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-900

FLOYD E. McDOWELL,

Petitioner,

vs.

TEXAS BOARD OF MENTAL HEALTH AND MENTAL RETARDATION, ET AL,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

NATURE OF THE CASE

This is a suit for damages by a former employee of the State of Texas Board of Mental Health and Mental Retardation. The District Court and the U. S. Court of Appeals for the Fifth Circuit dismissed the case because no federal question was involved and because the evidence clearly showed that McDowell's dismissal resulted from inefficiency, incompetency and insubordination, *McDowell* v. *Texas Board of Mental Health and Mental Retardation, et al.*, 465F.2d 1342 (5th Cir. 1972).

STATEMENT OF FACTS

Petitioner McDowell, herein called Plaintiff, was hired by Respondents, herein called Defendants, under a Texas statute (Article 691, Vernon's Texas Civil Statutes) which provided that Defendants were "vested with full authority and discretion to terminate the employment of any such superintendent at any time".

Defendants' answer and the evidence shows that Plaintiff's employment was terminated as the result of a culmination of events that had taken place over a two-year period. (A.109,125)

After Plaintiff had been discharged, he made the following statement to the press:

> "Looking back on it, I have refused to follow some orders and administrative practices. I am amazed I stayed so long." (A. 80,84)

Plaintiff was discharged for inefficiency, incompetency and insubordination. Eleven reasons for his discharge were set out in Defendants' answer. (A. 5,6) When he was first employed, he refused to prepare a grant although he was ordered to prepare it by Defendant Barnett. (A. 71,106) Barnett was Deputy Commissioner of the Board of Mental Health and Mental Retardation and was Plaintiff's supervisor. Contrary to instructions, Plaintiff employed persons for whom there were no job classifications. (A. 72) He employed unqualified persons. (A. 72)

He refused to follow instructions from the central office. (A. 74) Plaintiff left his former job in Florida because he refused to follow the instructions of his superiors. (A. 69) He failed to properly prepare his budget. (A. 47,76) He refused to cooperate with the Texas Research for Mental Sciences. (A. 48, 73, 74)

Where there were no classified positions open, he hired consultants. (A. 73) He was openly critical of the central office. (A. 76, 97, 98) He openly disagreed with the policies of his superiors. (A. 30, 31, 97) Defendant Barnett told Plaintiff to pack his bags if he could not follow directions and instructions from the central office. (A. 75,107)

Defendant Barnett was the Deputy Commissioner of the Mental Health and Mental Retardation Department and had the final power to admit retarded children in any State school. Wyatt Connally, a mongolid child, was eligible for admission to Richmond State School. (A. 42, 93) Plaintiff refused to admit this child even though ordered to do so by Deputy Commissioner Barnett. (A. 84, 106) Plaintiff said he would not admit the Connally child regardless of what the Central Office said; the evidence showed that he was a State employee and subject to the control of Defendants. (A. 29)

Plaintiff was called to Austin by the Central Office in November of 1967 and his deficiencies and insubordination were discussed. (A. 36,75,76) He was again called to Austin in May of 1968 and his failure to follow instructions and directions from the Central Office were again discussed. (A. 46, 48, 76, 77) He was looking for another job long before he was fired. (A. 78,79) He was immediately reemployed in a better paying job. (A. 80,81) The evidence showed that he was reemployed within eight working days after he was fired; that he had twenty jobs offered and was immediately employed at an annual salary of $20,000 which was increased to $22,500. (A. 80,81) His compensation at the Richmond State School was only $18,000 per annum. (A. 63,64)

Defendants were told by David Sloane that Plaintiff

had called Defendants Barnett and Kinross-Wright sons of bitches at a public meeting. (A. 103, 104)

Plaintiff was discharged because of his attitude and in culmination of a long series of events that had taken place over a two-year period of time. (A. 109,125) At the time of his firing, Plaintiff talked with the Defendants around fifteen minutes but at the time of the trial he didn't remember what was said in this conversation. (A. 51)

At the conclusion of the testimony, Plaintiff admitted there was nothing to submit to the jury. (A. 122) The trial judge correctly held that no federal question was involved .(A. 126)

In this case there is no question of tenure or of expectancy of continuing employment. The U. S. Court of Appeals for the Fifth Circuit, in its opinion of May 6, 1971, held as follows:

> "The record is devoid, however, of any evidence that Dr. McDowell had such an expectancy of reemployment." (P. 10)
>
> "Under the circumstances of this case, no federal constitutional right to a trial type hearing existed." (P. 13)
>
> "Unlike Dr. Ferguson, Dr. McDowell had no expectancy of reemployment. Unlike Sindermann or Battle, he asserted no deprivation of specific constitutional rights." (P. 14)

ARGUMENT AND AUTHORITIES

Under the facts in this case, both the trial court and the U. S. Court of Appeals correctly held that the pleadings and the evidence presented no federal question and that the state questions were solely within the ambit of state control. *Johnson* vs. *Hood,* 430 F.2d 610 (5th Cir., 1970).

In *Freeman* v. *Gould Special School District of Lincoln County, Ark.*, 405 F.2d 1153 (8th Cir., 1969), the Court held that in the absence of statutory contractual requirements, public school teachers discharged for inefficiency, incompetency, or insubordination have no constitutional right to a hearing with rights of cross-examination and confrontation of witnesses.

In *Bailey* v. *Richardson*, 182 F.2d 46 (D. C. Cir., 1950), affirmed 71 S.Ct. 669 (1951), it was held that in the absence of a statute or custom to the contrary, executive offices are held at the will of the appointing authority and that a State employee has no constitutional right to a hearing where no constitutional rights are involved.

The *McDowell* case was tried before the appellate decision was rendered in *Ferguson* v. *Thomas, et al*, 430 F.2d 852 (5th Cir. 1970). However, the *Ferguson* case expressly holds that an employee is afforded due process by a trial in the U. S. District Court where the charges against him are made known and he has the right to present his case, take depositions, and cross-examine the witness. At 430 F.2d 858 the Court held as follows:

> "In the court below, Dr. Ferguson was allowed to depose witnesses in advance of the hearing and to call and cross-examine all witnesses he chose to call or cross-examine relative to the procedures followed in, as well as the merits of, terminating his services. Included in this group of witnesses were both of the men Dr. Ferguson wanted to present to the Board. Each and both of these administrators testified in the court below to even more damaging facts than those President Thomas presented to the Board. The department head who Dr. Ferguson was so anxious to call described him as a svengali who courted favor with the students at

the expense of their education, then used the influ
ence and power gained with the students as
threat against anyone who confronted him con
cerning matters of discipline or academic excel
lence. This condition intimidated the departmen
head to the extent that some of his open criticism
of Dr. Ferguson were very much milder than hi
true feelings warranted (a condition which evi
dently badly mislead Dr. Ferguson).

"Since the very witnesses Dr. Ferguson wanted
to present have now testified and it is clear from
their testimony that they would have greatly en
hanced the basis of the Board's action in affirm
ing his termination, it is not necessary for this
cause to be remanded to the district court for re
ferral back to the school board. Justice and fair
ness to all parties indicates that his termination
may be affirmed here and now."

As in the *Ferguson* case, the evidence presented in the Trial Court proved conclusively that McDowell was discharged for cause under the state law and that no federal question was presented by the facts. In *Sindermann* v. *Perry*, 430 F.2d 939 (5th Cir. 1970) this Court expressly held that where there was no expectancy of reemployment, as in the McDowell case the burden was on McDowell to prove that Defendants were wrong in not continuing his employment. The evidence presented in this case clearly shows that McDowell's employment was terminated for adequate cause, as in the Ferguson case, and he failed to prove any wrongful conduct on the part of Defendants either before or during the trial of this cause in the U. S. District Court.

Appellant McDowell was fired because of his incompetency, his inefficiency and his refusal to follow Defendants' instructions over the entire period of his employment. No federal question is involved in this case.

McDowell had no tenure or expectancy of reemployment and he was fired for adequate cause. He has fully presented his side of the case in the Trial Court. After concluding his evidence he admitted he had nothing to present to the jury. In all fairness, and under the applicable law, the action of the Texas Department of Mental Health and Mental Retardation and its officials in terminating McDowell's employment should be upheld.

In affirming the dismissal of Plaintiff's case, the fifteen Federal Judges for the Fifth Circuit correctly held as follows:

> "PER CURIAM: Subsequent to en banc briefing, argument and reconsideration of this cause, the Supreme Court decided Board of Regents of State Colleges v. Roth, —— U.S. ——— (1972) [40 L.W. 5079, June 29, 1972], and Perry v. Sindermann, —— U.S. ——— (1972) [40 L.W. 5087, June 29, 1972], which review and distill the rules of procedural due process in State employment situations. These decisions make it clear that the opinion of the panel was correct and it is adopted as the opinion of the court en banc." (465 F.2d 1349).

CONCLUSION

The Court of Appeals for the Fifth Circuit is in all things correct and the petition for a writ of certiorari should be refused.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jack Sparks, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do hereby certify that three copies of the foregoing brief have been forwarded by U. S. Mail, postage prepaid, to the attorney for Petitioner, David R. Richards, Clinton & Richards, 600 West 7th Street, Austin, Texas 78701.

JACK SPARKS